United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

76-4151
76-4153

United States Court of Appeals
For the Second Circuit

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK and ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

against

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK,

Intervenor.

Rehearing en banc Pursuant to Order of February 15, 1977

BRIEF FOR INTERVENOR, POWER AUTHORITY OF THE STATE OF NEW YORK

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March 22, 1977

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Docket Nos. 76-4151, 76-4153

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Issues Presented for en banc Review

The issues presented for review by this Court are: 1. Is the Federal Power Commission (Commission or FPC) authorized by law to reimburse intervenors in a Commission proceeding for counsel fees and expenses incurred by

such intervenors? 2. If the Commission is so authorized can funds supplied by the applicant for a license be used to pay the intervenors' fees and expenses?

Prior Judicial Proceedings

This licensing procedure seeking authorization of a transmission line was before this Court on two prior occasions. In *Greene County Planning Board* v. *FPC* (Greene County I), 455 F. 2d 412 (2d Cir., 1972) cert. den., 409 U.S. 489 (1972) the FPC regulations were found not to comply with the National Environmental Policy Act of 1969 (NEPA). Subsequently in *Greene County Planning Board* v. *FPC* (Greene County II), 490 F. 2d 256 (2d Cir., 1973) the intervenors sought review of the Commission's rulings prior to the final order and their complaint was dismissed as being premature since they had not exhausted their administrative remedies.

On both occasions the intervenors requested that their counsel fees and expenses be reimbursed by the Commission or applicant, or both. The request was denied each time.

On the third occasion the intervenors asked that the order of the Commission authorizing the transmission line be set aside and renewed their requests for counsel fees and expenses. A panel of this Court (Lumbard and Van Graafeiland, Circuit Judges and Bonsal, District Judge) unanimously affirmed the Commission's order. A majority of the panel held that the Commission had authority to reimburse the Durham petitioners' request for their reasonable counsel fees and expenses and remanded the fee reimbursement

issue to the Commission for further consideration. *Greene County Planning Board* v. *FPC,* Docket Nos. 76-4151 and 76-4153 (2d Cir., December 8, 1976). Judge Van Graafeiland dissented from the majority on the fee reimbursement issue, upon the ground that there is not an act of Congress which is required to authorize such payments.

Statement of Facts

On August 15, 1968 Power Authority of the State of New York (Authority), which is an intervenor in this proceeding, filed an application with the Federal Power Commission for a license under Part I of the Federal Power Act to construct a pumped storage power plant to be located in the Towns of Blenheim and Gilboa in Schoharie County, New York (the Blenheim-Gilboa Project).

After extensive consideration the Commission on June 6, 1969 issued a license for the Blenheim-Gilboa Project (*Power Authority of the State of New York,* Project No. 2685, 41 FPC 712). Pursuant to Article 34 of the license the Authority on November 24, 1969 filed with the Commission exhibits depicting the proposed locations of three transmission lines. These would constitute primary lines connecting the project to the inter-connected grid in New York State.

On January 21, 1970 petitions for leave to intervene in the proceeding with respect to only the line from the Blenheim-Gilboa Project to Leeds (a substation located near Catskill, New York), approximately 30 miles from the project were filed by the Town of Durham, the Association for the Preservation of the Durham Valley and several

individuals who owned property in the Town of Durham. Subsequent petitions for intervention were filed by the Greene County Planning Board, the Town of Westerlo, Congressman Hamilton Fish, Jr., the Sierra Club and an additional landowner. All petitions for intervention were granted by the Federal Power Commission. (See FPC Orders dated May 19, 1970, May 4, 1971, and August 6, 1971.)

Exhibits for the other two primary transmission lines associated with the Blenheim-Gilboa Project were approved by the Federal Power Commission without intervention or controversy. Such lines have been constructed and are in operation.

On December 4, 1970 the Authority filed alternative proposals for the route of the Gilboa-Leeds line with the Commission which were designated Route A and Route B. The Authority indicated a preference for Route A, but a willingness to construct along either A or B. Subsequently on March 26, 1971 the Authority filed with the Commission its environmental report which depicted three additional Routes (C, D and E) considered but not recommended by the Authority. The report was prepared in accordance with existing Commission regulations which were designed to comply with NEPA. Several of the intervenors, including the Town of Durham and the Association for the Preservation of the Durham Valley, filed motions with the Administrative Law Judge and subsequently with the Commission asking that the Commission, or alternatively the Authority undertake to pay intervenors' expenses including counsel's fees in the proceeding. The motions were denied by the examiner and by the Commission.

In accordance with its regulations the FPC opened hearings on the Authority's proposed routes on November 9, 1971. The hearings were interrupted by an appeal to this Court which resulted in the decision in *Greene County I* in which this Court held that the then existing FPC regulations did not comply with NEPA and remanded the proceeding to the FPC for further proceedings in compliance with NEPA.

As part of the appeal in *Greene County I* petitioners requested an order requiring the Commission or in the alternative the Authority to pay their reasonable fees and expenses. This Court denied the request noting that it could not make such an award "without a clearer congressional mandate", 455 F. 2d at 426.

Hearings after compliance with NEPA were then held. Petitioners again sought review by this Court in *Greene County II* and their petition was denied on the grounds that there was no final order before the Court for review. Petitioners repeated their request for reimbursement of fees and expenses and again their request was denied. A subsequent petition for rehearing and a suggestion for rehearing en banc of that case was denied.

At the conclusion of hearings briefs including arguments on the fee issue were submitted by all parties to the Administrative Law Judge. On July 1, 1974 the Judge issued his Initial Decision recommending approval of the construction of the Gilboa-Leeds line. Briefs on exceptions and opposing exceptions were filed and on January 29, 1976 the Federal Power Commission issued its Opinion No. 751,

Power Authority v. *State of New York Project No. 2685.* The Commission after finding that it had no authority to award counsel fees to intervenors decided that while the intervenors had "every right to present their case as have countless other intervenors in cases before the Commission . . . . These intervenors are protecting their own interests and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably upon its rate payers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice" (FPC Opinion No. 751, p. 21).

In denying petitions for rehearing the Federal Power Commission again rejected the argument that the Commission or applicant should reimburse the intervenors for fees and expenses (F.P.C. Opinion No. 751-A, April 27, 1976).

On September 27, 1976 the intervenors petitioned this Court for review of the FPC decision including the issue of reimbursement for counsel fees and expenses of the intervenors in the FPC proceeding.

A panel of this Court in an opinion issued by Judge Lumbard on December 8, 1976 affirmed the determination of the FPC as to the transmission line but remanded the fee issue to the Commission for reconsideration in the light of a recent decision of the Comptroller General which pronounced that it would not disallow payment of intervenors' expenses in Nuclear Regulatory Commission proceedings even though Congress had not specifically authorized it.

Judge Van Graafeiland dissented from the decision as it applied to the fee issue, stating:

> "I can find no statute which empowers the Comptroller General to issue what is in effect a declaratory judgment clothing the Federal Power Commission with authority to disburse public funds, in the face of the Commission's own determination that it has no such power and this Court's finding in support thereof." (Slip Op. at 830)

and

> "We abdicate our responsibility when we treat an unsolicited interpretation by the Comptroller General as the equivalent of a Supreme Court ruling, and needlessly inject the Federal Courts into an area of administrative discretion when we compel the Federal Power Commission to conform its practices to what the Comptroller General opines are proper. *Cf. Greene County Planning Board* v. *FPC, supra,* 455 F.2d at 427." (Slip Op. at 832)

Petitioners on December 20, 1976 petitioned for rehearing en banc on the decision of the FPC to license the transmission line. This was denied by this Court on February 15, 1977. On January 5, 1977 the FPC petitioned for a rehearing en banc on the fee issue. This request was granted by the Court on February 15, 1977.

POINT I

Federal Power Commission has no authority in the proceedings before it to award expenses and fees to intervenors.

This Court determined in *Greene County I* that without a clearer congressional mandate a court may not order an administrative agency to pay fees and expenses of intervenors before it and that such a congressional mandate did not exist in the Federal Power Act. Thus the Federal Power Commission did not have power to make such awards. The Court pointed out that the suggestion made by intervenors that Section 309 of the Federal Power Act extended the Commission's power to include paying or rewarding fees of intervenors did not constitute the required congressional mandate to afford the relief requested. Section 309 simply provides that:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the

> purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [49 Stat. 858-859; 16 U.S.C. 825h]."

This Court stated that when Congress has found it to be in the express public interest to provide administrative agencies with a mandate to pay counsel fees in proceedings before the agencies it has not hesitated to do so with an explicit direction and referred to the Clayton Act, 15 U.S.C. 15; Communications Act of 1934, 47 U.S.C. 206; Interstate Commerce Act, 49 U.S.C. 16 (2). 455 F. 2d at 426.

Since *Greene County I* was decided Congress has specifically authorized the payment of counsel fees in other statutes. See Toxic Substance Control Act, 15 U.S.C. 2620 (4) (c); Clean Air Act, §304 (d). No similar legislation has been enacted which would authorize the FPC to make such payments.

The Supreme Court has conclusively determined that in the absence of a clear congressional directive intervenors in administrative proceedings are not entitled to counsel fees (*Alyeska Pipe Line Service Co.* v. *Wilderness Society*, 421 U.S. 420 (1975).

The *Alyeska* case which involved environmental challenges to the issuance of permits for the construction of the trans-Alaska Oil Pipe Line restated the basic rule applicable to judicial proceedings in the United States that absent

a statute or enforceable contract litigants must pay their own counsel fees. This is referred to as the "American Rule" and the court related that rule to administrative proceedings.

With respect to administrative agency proceedings, the Supreme Court decision in *Alyeska* was more fully considered and followed in *Turner* v. *FCC*, 514 F. 2d 1354 (D.C. Cir. 1975). In *Turner*, the Court considered the Supreme Court decision in *Alyeska* in deciding whether the intervenors in a Federal Communications Commission (FCC) license proceeding were entitled to be reimbursed for legal expenses. The District of Columbia Circuit Court held that the FCC could not properly order reimbursement of legal fees without specific statutory authority. The principle was restated that only Congress and not an administrative agency could authorize an exception to the "American Rule" that litigants bear the expenses of their litigation. The Court in *Turner* found that the reasoning of the Supreme Court in *Alyeska* was fully applicable to litigation before the FCC. It is equally applicable to litigation before the Federal Power Commission.

Courts should award counsel fees sparingly and only within established exceptions to the "American Rule" against the award of fees. *Foley* v. *Devaney*, 528 F. 2d 888 (3d Cir., 1976). No exception to the "American Rule" has been established in this case.

Moreover an award of counsel fees cannot be justified on a theory that a litigant has in some fashion provided a "public benefit". As stated in *Wright* v. *Jackson*, 522 F. 2d 955 (4th Cir., 1975) "so far as award of counsel fees

on a public benefit basis is concerned it is not done'' 522 F. 2d at 957.

As pointed out in *Lythe* v. *Commission of Elections of Union County,* 541 F. 2d 421 (4th Cir., 1976) the Supreme Court in *Alyeska* "specifically recognized that it was for the Congress to select, by statutory authorization, those types of actions in which attorney's fees should be awarded.'' Before Congress can issue such an authorization there must be a congressional determination that a policy is so important or public enforcement mechanisms are so ineffective that attorney's fees are necessary to promote private enforcement. *McCrary* v. *Runyon,* 515 F. 2d 1082 (4th Cir., 1975).

Contrary to the position of petitioners and the majority of the panel the letter of the Comptroller General dated February 19, 1976 does not provide the necessary *congressional* determination that the award of counsel fees by the Federal Power Commission would be justified. In effect all that opinion states is that the Comptroller will not reject such payments by an administrative agency if they were awarded to an intervenor who was found by the agency to have rendered an assistance in the proceeding and determined to be indigent. This is not a clear congressional mandate which would authorize the FPC to make awards to intervenors with impunity. That the Comptroller would not object does not clothe the payment with authority.

The recitation of the history and purpose of the Comptroller General in the brief of the Durham intervenors is interesting but of no significance as to whether Congress

has expressly mandated the payment in question. Only legislation specifically or by clear implication can authorize the payments.

The opinion of the Comptroller General affects only what he would do in approving the payments under given circumstances acceptable to him. The panel's decision to treat the Comptroller General's opinion as dispositive of the issue ascribes to the Comptroller General a role as a judicial interpreter of statutes. As pointed out by Judge Van Graafeiland:

> "Moreover, appellants, Town of Durham and Association for the Preservation of Durham Valley, now demand that we direct the Federal Power Commission to comply with the Comptroller General's contrary interpretation of the law. I cannot agree that this is a proper role for this Court to play."

The panel made no attempt to interpret the statute but adopted the Comptroller's General's interpretation. In fact it could not interpret the statute since this Court had already decided in *Greene Couty I* that the Federal Power Act did not authorize such awards without a clearer congressional mandate. The majority on the panel justify ignoring those holdings solely on the basis of a non-judicial opinion which they claim gives such a congressional mandate. In effect they reversed this Court's judicial opinion rendered in *Greene County I* by saying it was superceded by a non-judicial opinion analyzing the intent of Congress in enacting the Atomic Energy Act. The opinion of the Comptroller General did not even specifically deal with the Federal Power Act.

To allow the determination of the majority of the panel to stand would be to inject a new and unwarranted basis for the reversal of judicial decisions into our legal system.

Certainly no such change can be accepted and the previous holding of this Court in the *Greene County I* finding that there was no congressional authorization in the Federal Power Act which would allow payment of intervenors' fees and expenses must be adhered to.

POINT II

The payment of funds to intervenors for counsel fees and expenses from available Federal Power Commission funds would necessarily involve "fee shifting" to intervenors from applicants.

As stated above the "American Rule" is that a litigant must pay his own counsel fees absent a clear statute or an enforceable contract to the contrary. It is a clear violation of this rule to require the FPC to fund intervenor litigation fees out of its available funds. Such funding would result in a direct shifting of licensing fees paid to the FPC by licensees and proposed licensees to parties opposing actions taken by the FPC in its administration of licenses or proposed licenses.

This problem of "fee shifting" highlights the weakness of petitioners' argument that there is authorization by implication in the Federal Power Act to pay intervenors' counsel fees and expenses.

Pursuant to Section 10(e) of the Federal Power Act (16 U.S.C. 803 (e)) licensees must pay to the United States

the total costs of administration of Part I of that Act, which is the statutory framework under which the Commission licenses hydro-electric power projects and associated transmission lines.

Section 10(e) of the Federal Power Act is the only section which provides for funding costs of the administration of Part I. Therefore, if payments to intervenors are authorized, such payments would result in increased costs of administration and therefore increased license fees. Thus payments to intervenors would involve "fee shifting" which was specifically proscribed by the Supreme Court in *Alyeska*. A specific appropriation of funds by Congress for intervenors would be necessary to avoid this "fee shifting".

Therefore the argument that authorization to pay intervenors' fees can be found by implication in the Federal Power Act runs directly into the prohibition in *Alyeska*. Only by specific Congressional action appropriating funds for intervenors' fees and expenses can an administrative agency which obtains funds from both Congress and the applicants be authorized to pay such fees.

The majority decision below attempts to distinguish *Alyeska* by citation of the opinion of the Comptroller General which held that an administrative agency can reimburse a prevailing litigant for his expenses on the ground that such reimbursement "is distinguishable from fee shifting because it involves no exercise of compulsion against a private party" (Slip Op. at 827).

If the FPC must fund intervenors then they will be required to use licensee's monies since there are no other

separately appropriated funds available for such purpose. Licensees and applicants are compelled to pay such fees and it matters not that the FPC is making the payment to intervenors rather than licensees or applicants paying them directly. The exercise of a compulsion against a private person or against the FPC which holds his funds has the same net result, the funds are paid to his opponents in a litigated matter. The fee is shifted no matter what the route and this is not allowed under *Alyeska*.

In the absence of an explicit appropriation from Congress for intervenor funding, the only available source of funds under the Federal Power Act is licensees' and applicants' fees. The Comptroller General's opinion failed to take into account that the statutory framework of the FPC requires fee shifting if intervenor funding is authorized.

The Durham intervenors argue that even if there is such a fee shifting it is *de minimis*. The *Alyeska* decision makes no such distinction, nor is it warranted. The "American Rule" makes fee shifting improper. Petitioner cites no statute or case which has modified the rule in *de minimis* situations, nor have intervenors-respondents discovered any such modification.

Furthermore the amount the Durham intervenors would be paid in this case is unknown and certainly the future cost of providing fees to all intervenors in FPC proceedings is unknown. Even though it may be small to begin with, it could easily become a large item of expense. If the Administrative agency does not obtain sufficient appropriations from Congress to fund these expenses, it would then look to its other source of funds and seek to increase the Section 10(e) charges. Therefore that which started out

to be *de minimis* could easily become burdensome to applicants and licensees.

If there is fee shifting it is not allowed without a specific act of Congress or prior agreement no matter what the amount to be paid or the number who share in the payment. See *Alyeska* and *Turner, supra.* The principles in these cases establish that Section 2 of the Federal Power Act (16 U.S.C. 793) does not provide the specific congressional authorization required to justify the award of counsel fees. (Compare Section 2 with the specific language of statutes where the Congress has determined that counsel might properly be reimbursed; see 42 U.S.C. 1973 (e); 15 U.S.C. 2620 (4) (c); 15 U.S.C. 15; 57 U.S.C. 206; 19 U.S.C. 16 (2).)

Thus, in the absence of a clear and specific congressional mandate as required by the American Rule and most recently pronounced in the *Alyeska* case, the Federal Power Commission has no authorization to grant counsel fees to intervenors in proceedings before it.

POINT III

The Greene County Planning Board and the Town of Greenville are not properly before this Court.

The issue of fees to Greene County Planning Board and the Town of Greenville is not properly before this Court. Only the petition for review of so much of the decision as remanded the Durham intervenors fee issue to the Commission was granted. The rehearing en banc thus can only treat with the issue of reimbursement as raised by the Durham petitioners.

Conclusion

For the foregoing reasons, the December 8, 1976 decision by a panel of this Court with respect to the fee reimbursement issue should be reversed and the orders of the Commission should be affirmed.

Respectfully submitted,

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and

POWER AUTHORITY OF THE STATE OF NEW YORK,

Intervenor,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 1249,

Applicant for Intervention

Nos. 76-4151
Nos. 76-4153

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

JOHN B. HAMOR, being duly sworn, deposes and says:

1. Deponent is not a party to the action, is over 18 years of age and resides at 122 East 235th Street, Bronx, New York 10470.

2. On March 22, 1977 deponent served the within Briefs of Intervenor on attorneys for all the parties to this proceeding by depositing a true copy of said in a postpaid properly addressed wrapper in an official depositary under the exclusive care and custody of the United

States Postal Service within the State of New York.

John B. Hamor
JOHN B. HAMOR

Subscribed and Sworn to
before me this 22nd day of
March, 1977.

Maureen A. Morris
Notary Public of the State of New York

MAUREEN A. MORRIS
Notary Public, State of New York
No. 4629251
Qualified in Kings County
Commission Expires March 30, 19 78

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